In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 565

THE OKANOGAN, METHOW, SAN POEILS (OR SAN POIL), NESPELEM, COLVILLE, and LAKE INDIAN TRIBES or BANDS of the State of Washington, petitioners

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT

Article I, Section 7, Clause 2, of the Constitution reads as follows:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Jour-

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THE OKANOGAN, METHOW, SAN POELIS (OR SAN POIL), NESPELEM, COLVILLE, AND LAKE INDIAN TRIBES OR BANDS OF THE STATE OF WASHINGTON, petitioners

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 61) has not been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered April 16, 1928. (R. 66.) A motion for new trial was seasonably made and entertained and overruled October 22, 1928. (R. 67.) The petition for certiorari was filed December 4, 1928. (R. 67.) The jurisdiction of this Court rests on the Act of February 13, 1925.

THE QUESTION PRESENTED

The question presented is whether a bill which was passed by both Houses of Congress and presented to the President less than ten days, Sundays excepted, before the adjournment of the first session of the Congress, but which was not signed by him, nor returned by him to the House in which it originated, became a law without his signature.

Stated in another way, the question is whether the provision in Article I of the Constitution, to the effect that—

> If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law,

refers to any adjournment of Congress or only to final adjournment of the last session. It is also necessary to consider whether the clause relating to a bill returned without Presidential approval, directing that it be returned to that House in which it shall have originated, contemplates a return to a House in Session or allows a return to some officer of the House after the House has adjourned.

PROVISION OF CONSTITUTION INVOLVED

Article I, Section 7, Clause 2, of the Constitution reads as follows:

> Every Bill which shall have passed the House of Representatives and the Senate,

shall, before it become a law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Article I, Section 5, Clause 4, provides:

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, * * *.

STATEMENT

Senate Bill No. 3185, 69th Congress, First Session, entitled "An Act authorizing certain Indian tribes and bands, or any of them, residing in the State of

Washington, to present their claims to the Court of Claims," having passed both Houses of Congress and having been properly authenticated, was presented to President Coolidge for his consideration on June 24, 1926. On July 3, 1926 (eight days thereafter, Sundays excepted) the House of Representatives "adjourned sine die" and the Senate "adjourned until 12.30 o'clock p. m., Wednesday, November 10, 1926." (Cong. Rec., vol. 67, pt. 11, pp. 12885, 13009, 13100.) The President did not sign the bill nor did he return it with his objections to the House in which it originated.

Taking the position that the bill had thereby become a law, the petitioner filed a petition in the Court of Claims in accordance with the terms of the bill. The United States demurred on the ground that the bill had never become a law. The court sustained the demurrer and dismissed the petition. (R. 61, 66.) A rehearing was denied. (R. 66, 67.) On January 21, 1929, this Court grant a writ of certiorari. (R. 68.)

SUMMARY OF ARGUMENT

For an answer to the questions presented, we turn to the proceedings of the Constitutional Convention, consider the words of the pertinent clauses in the Constitution, and the practical construction which has been given to them.

The clause in the Constitution was evidently taken from a similar provision then in the constitution of the State of New York. The only signif-

icant thing in the action of the Constitutional Convention was that it deliberately omitted a provision then found in the New York constitution, to the effect that in case adjournment rendered the return of a bill impracticable it—

> shall be returned on the first day of the meeting of the legislature after the expiration of the said ten days.

The words of Article I leave no doubt as to their meaning. The provision that if the bill is not returned within ten days, Sundays excepted, it shall be a law, means ten calendar, not legislative, days. The Constitution has not excepted days in which Congress is not in session. Its exception of Sundays shows that every other day is to be counted. The provision—

> unless the Congress by their Adjournment prevent its Return,

means its return within ten days, and the return prevented by adjournment is a return within ten days, Sundays excepted. An adjournment would not prevent a return unless there was a time limit on the return. It would not prevent a return if the ten days were legislative days. There is no basis for limiting the application of the word "adjournment" to an adjournment at the end of a Congress. The Constitution itself uses the word "adjourn" in the broad sense. Congress loses its opportunity to pass a bill over the President's disapproval by not being in session on the tenth

day following its presentation to the President, if he fails meanwhile to return it.

The construction contended for by the petitioners contemplates that a bill may be returned to the House in which it originates although Congress has adjourned. This requires that the return may be to some officer of the adjourned House, to be retained in his custody until Congress reassembles. No Act has ever been passed authorizing any officer of either House to so receive returned bills, and there is no rule of either House giving such authority. The return must be to the House and not to an officer. The word "House," as used in the Constitution, has always been held to mean the House in session. No Message from the President, or Message from either House to the other, is received except by a House in session.

The practical construction given to this clause in the Constitution is controlling. Since the organization of the Government there have been 120 cases like this of so-called pocket vetoes, at *ad interim* adjournments. In no case, prior to the action of the House of Representatives in the 69th Congress, has any action been taken by Presidents or Congress on the theory contended for by petitioners, and in none of the 120 cases referred to has any of the pocketed measures been placed upon the statute books or treated as a law. This is the first case we know of where it has been asserted in court that such a pocketed bill became a law.

ARGUMENT

I

THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION CONTAINED ONLY ONE SIGNIFICANT ACTION

At the session of the Convention on August 6, the Committee of Detail's report contained in Article VI, Section 13, the following provision:

> * * * If any bill shall not be returned by the President within seven days after it shall have been presented to him, it shall be a law, unless the legislature, by their adjournment, prevent its return; in which case it shall not be a law.

The sentence just quoted was unquestionably based upon a clause of the New York constitution of 1777, which was then in force, with a very important modification. The New York constitution provided in Article III:

> * * * * *
>
> And in order to prevent any unnecessary delays, be it further ordained, that if any bill shall not be returned by the council within ten days after it shall have been presented, the same shall be a law, unless the legislature shall, by their adjournment, render a return of the said bill within ten days impracticable; in which case the bill shall be returned on the first day of the meeting of the legislature after the expiration of the said ten days.

It will be observed that the last twenty-three words were not followed in the Committee of Detail's report.

The provision proposed by the committee does not appear to have been discussed by the Convention until the end of the session of August 15, and the only reference to it in Madison's Notes is as follows:

> "*Ten* days (Sundays excepted)" instead of "*seven*" were allowed to the President for returning bills with his objections N. H. & Mas: only voting agst it.

The Committee of Style on September 12 reported two minor changes in the provision, making it read as finally adopted by the Convention:

> If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

On the following day Madison moved to insert between "after" and "it" the words "the day on which." This motion was defeated.

There was no discussion of any other portion of the sentence in the Convention; it was not mentioned in the Federalist; and it does not appear to have been discussed in any of the State conventions.

In State constitutions adopted after 1787 this provision of the Constitution of the United States was followed in numerous instances, of which only the New York constitution calls for consideration.

In 1822 the provision of that constitution quoted above was changed to read:

> * * * If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislature shall, by their adjournment, prevent its return; in which case it shall not be a law.

The convention discussed this clause on October 27, 1821. The change was proposed by Henry Wheaton, well known as the reporter of this Court and as an author. He moved to amend the amendment proposed by the committee of the whole by striking out the words—

> "in which case it shall be a law, unless returned on the first day of their next meeting," and inserting the following: "shall not be a law." Mr. W. stated his object to be to make the provision respecting bills, the return of which within ten days was prevented by the adjournment of the legislature, correspond with that in the Constitution of the United States, which seemed to him founded in wisdom. If Congress by their adjournment prevent the return of a bill by the President, it does not become a law. Nor was it fit that it should. The regulation proposed by the committee of the whole would enable the governor to keep in his own breast the secret whether a particular bill would or would not ultimately become the law of the land; and might enable those by whom he

> was surrounded to profit by that knowledge, which they alone would possess, to the disadvantage of the public in general. Such a practice would draw after it many of the evils of the secret legislation of despotic governments, and would certainly be abused to corrupt purposes in many cases where private rights were involved, or private interests affected by measures of a general and public character.
>
> The subject was further discussed by Messrs. King, Spencer, and Van Buren, when the question was taken on the amendment [to the report of the committee on the whole] and *carried*. (Report of the Debates and Proceedings of the Convention of 1821.)

The significant thing in the action of the Federal Constitutional Convention was the omission from the Constitution of the United States of the provision in the New York constitution that in case of adjournment the bill might be returned on the first day of the next session. The action of the New York constitutional convention in 1822 is significant in that it struck out that provision in its own constitution and adopted a clause like that in the Constitution of the United States.

II

THE WORDS USED IN THE CONSTITUTION ARE NOT FAIRLY SUSCEPTIBLE OF THE CONSTRUCTION URGED BY THE PETITIONERS

The petitioners advance several contentions, involving changes in the wording of the Constitution,

in order to sustain their contentions. They suggest that the clause that a bill shall be a law if it—

> shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him—

may mean ten legislative days—that is, ten days during which Congress shall have been in session. The Framers of the Constitution did not say that. They did not except from the ten-day period days in which Congress is not in session. The only exception is of Sundays, and there is no basis for inserting the word "legislative" after the word "ten." Besides, an adjournment of Congress would not prevent return within the specified time if the ten days mean ten days in which Congress is in session. No President has ever acted on the assumption that he had ten legislative days to consider a bill.

It is also clear that the clause—

> unless the Congress by their Adjournment prevent its Return

means a return within ten days, Sundays excepted. It follows that the return by the President must be made within ten calendar days, Sundays excepted, after the bill is presented to him. A bill returned without his approval to a subsequent session commencing more than ten days after presentation of the bill to the President is not a return within ten days. The President has ten days, Sundays excepted, after the bill shall have been presented to him in which to consider it, and if on the tenth day he is ready to return it without his approval, and is

unable to return it because of an adjournment, it does not become a law. If Congress has adjourned, how is a bill to be returned? To meet this difficulty with the petitioners' argument, they suggest that the bill may be returned to an officer of the House in which it originated, although that House may have adjourned. The Constitution states that the bill shall be returned to the "House" in which it shall have originated.

Returning it to an officer of either House after adjournment of Congress is not returning the bill to the Congress. There has never been any statute authorizing any officer of either House to receive bills returned by the President during adjournments, and there is no rule to that effect in either House. It has been the universal practice of the Houses of Congress to receive Messages from the President, or Messages from one House to the other, only while in session. (Hinds' Precedents, vol. 5, chap. CXXXVIII.) The rules of each House contemplate that Messages from the President or from one House to the other shall be received while the House to which the Message is directed is in session. (See Rule XI., House of Representatives; Rule XXVIII, Standing Rules of the Senate; Jefferson's Manual, XLVII.)

Curtis in his Constitutional History of the United States, 1889, Vol. I, p. 486, in the footnote, says:

> This expression, a "house," or "each house," is several times employed in the Constitution with reference to the faculties

> and powers of the two chambers respectively, and it always means, when so used, the constitutional quorum, assembled for the transaction of business, and capable of transacting business. This same expression was employed by the committee when they provided for the mode in which a bill, once rejected by the President, shall be again brought before the legislative bodies. They directed it to be returned "to *that* house in which it shall have originated"—that is to say, to a constitutional quorum, a majority of which passed it in the first instance * * *,

(citing Elliot, V, 349, 376, 378, 431, 536).

Hinds' Precedents show that a House in session may receive a message although a quorum is not present.

In 1868 the Judiciary Committee of the Senate reported a bill to regulate the presentation of bills to the President and the return of the same. (Cong. Globe, 40th Cong., 2d Sess., Part 2, pp. 1204, 1371.) It purported to authorize the President, when returning a bill to a House which was not in session, to return it to the Secretary of the Senate or the Clerk of the House, as the case might be, and to authorize the Secretary or the Clerk to endorse on it the date of its receipt and hold it until the House reassembled. That bill was not passed. We can not improve on the argument of Senator Davis, who then said (pp. 1372, 1373, 1405):

> Here is an objection that occurs to me at present to this bill: the Constitution requires that if the President does not approve a bill he shall return it with his objections to the

House in which it originated; this bill provides a different mode of disposing of that bill in case Congress has temporarily taken a recess or an adjournment. It dispenses with the requisition of the Constitution that the bill shall be returned to the House, and directs that it be returned to the officer of the House, if the body is not in session. I do not believe it is competent for Congress to make any such change as that. I believe that the Constitution is mandatory in that respect; that the bill, where the President vetoes a bill, must be returned to the House, and not to the officers of the House. Of course, if he is to return the bill to the House, the House must be in session, because it is not a House unless in session in the sense in which the Constitution requires the bill to be returned to the House by the President with his objections. * * *

I think it is the duty of the President, in the plain language of the Constitution, to return the bill, not to the Secretary or Clerk of either House, but to the House itself. That is the unambiguous and plain language of the Constitution. Then the question is, what is returning the bill to the House? It is returning it to the Senate or the House of Representatives in session, because when it is returned it is to be at once considered again. The Constitution contemplates that simultaneously with the return of the bill to the House in which it originated the House may take up the matter for consideration. But, sir, I think there can not be any doubt what-

ever as to the effect of the language. The language is, that the bill shall be returned to the House in which it originated. I take the position that to return the bill to the Clerk of the House of Representatives, if it originated there, or to the Secretary of the Senate, if it originated in the Senate, when those bodies are not in session, is not a return of the bill to the House in which it originated. * * *

Suppose the Constitution or the law requires the President to communicate to the two Houses or either of the Houses in the performance of that duty, when both Houses or the particular House to which he is directed to make communication be not in session, is he authorized to communicate to the Secretary or to the Clerk of that House? I conceive not. It is the duty and the right of the President to communicate to the House and not to a ministerial officer of the House. To enable him to communicate to the House it must necessarily be in session, because he can not communicate with either House when it is in any other situation than in actual session. It must be assembled and in actual session. * * *

Senator Bayard said on the same subject (p. 1941):

But, Mr. President, there is an additional objection which to my mind is all powerful. The committee propose in the same section, not intending to deprive the Executive of the ten days to which he is entitled, that if Congress is not in session during the ten days or

> at the end of the ten days the President may send the bill to the office of the Secretary of the Senate or the Clerk of the House of Representatives, according to the House in which the bill may have originated. There is no such provision in the Constitution; and the settled usage of this Government, without a single exception from its foundation, is that no communication is made by the Executive to either House except to the House in session, and that usage ought to have a controlling influence to exclude the idea which is contained in the provision of the bill that I am now referring to. • • •

If it is not legally possible to return a bill to a House not in session, it is plain the petitioners' argument must be rejected.

It is obvious that an adjournment would not prevent a return if return may be made to an officer of a House not in session.

There is no basis in the Constitution for the contention that the word "adjournment" relates only to an adjournment of a final session. In 1868, in considering the bill last referred to, Senator Bayard said on this subject (p. 1941):

> The construction given by the committee is, in my judgment, erroneous in two respects. In the first place, the committee confine the term "adjournment," as used in the Constitution, to a particular meaning not justified by its received signification at the time of the passage of the Constitution and now, or by its etymology. An adjournment

> may be defined to be, I will not say a suspension of business, but a postponement of session for a period of one day, from one day to another, or for any number of days. That is an adjournment. It may be from day to day; it may be without day; it may be for a period of ten days or three months. Each is equally included under the word "adjournment." The committee, however, propose to confine the meaning of the word "adjournment," as used in this clause of the Constitution, to adjournment without day. The Constitution uses no such language. It is necessary to add to the general term "adjournment" there used the words "without day," or "*sine die*," in order to justify the construction for which the committee contend.

That the word "adjournment" has no such narrow meaning as petitioners contend for is shown by the fourth clause in Section 5 of Article I of the Constitution, which provides:

> Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days * * *.

The word "adjourn" in that clause was not used in the sense petitioners contend for.

In the 69th Congress, 2d Session, the Judiciary Committee of the House made a report (House Report No. 2054, 69th Cong., 2d Session) in which it expressed the conclusion that H. R. 5218, "An Act to carry into effect the twelfth article of the

treaty between the United States and the Shawnee Tribe of Indians," having on July 3, 1926, passed both Houses, and having been then presented to the President, became a law, although there was a final adjournment on July 3, 1926, of the first session of the 69th Congress, and the President did not approve the bill nor did he disapprove it and return it to the House in which it originated, or make any return to either House. On the strength of that report, and adopting it as the law, the Chairman of the Committee of the Whole, considering the statute to have become law, overruled a point of order made against the inclusion in an appropriation bill of an appropriation to provide funds to carry the statute into effect. (Cong. Rec., Vol. 68, Part 5, pp. 4932, 4937.)

No appeal was taken from his ruling. The reasons to support the view of the Judiciary Committee are fully set forth in the debates. (Cong. Rec., above referred to, pp. 4932–4937.) Those supporting the view of the Committee were forced to conclude that a bill might be returned to a House not in session by leaving the bill with its Clerk. We have the utmost deference for the views of the learned Members of the Judiciary Committee of the House. We feel confident, however, that if there had been presented to the Committee the constitutional difficulties in the way of returning a bill to a House not in session, and the overwhelming practical construction of the Constitution afterwards disclosed, in House Doc. 493, hereinafter

referred to, the Committee's conclusion would have been the other way. The House of Representatives has itself always used the word "adjournment" as describing the adjournment taken at the end of a session as well as the final adjournment of a Congress. Its Rule XXVI provides:

UNFINISHED BUSINESS OF THE SESSION

> All business before committees of the House at the end of one session shall be resumed at the commencement of the next session of the same Congress in the same manner *as if no adjournment had taken place.* (Italics ours.)

The only decision of this Court having any bearing on this subject is *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423. In that case the President signed a bill while Congress was in recess, but within the ten days after it was presented to him. The Court held that the President had power to sign a bill during the recess. It reserved the question whether he could sign a bill after adjournment for the session, as a question not arising in the case.

It is probable that the logic of our position leads to the conclusion that there is no distinction between an adjournment and a recess, so called. If a bill to be returned to the House in which it originated must be returned to the House while in session, it follows that if the House in which it originated is not in session on the tenth day after presentation

to the President, and he does not approve it or return it, it is not a law.

The inevitable conclusions are: (1) That the ten-day period referred to is not a period of ten legislative days, but ten calendar days, Sundays excepted; (2) that the return prevented by an adjournment is a return within ten calendar days, Sundays excepted, after presentation of the bill to the President; (3) that such a return is prevented by an adjournment by which the House in which the bill originated is not in session on the tenth day after presentation, and that the word "adjournment" refers to any adjournment and not alone to an adjournment at the end of a Congress.

III

THE PRACTICAL CONSTRUCTION IS CONTROLLING, AND IT COMPLETELY SUSTAINS THE RESPONDENT'S POSITION

Under date of December 22, 1928, the President transmitted to the Congress a copy of a memorandum prepared in the office of the Attorney General showing the results of an exhaustive research of governmental archives, for the purpose of disclosing the practical construction placed upon the constitutional provisions here involved. (House Document No. 493, 70th Cong., 2d Session.) That memorandum covers so-called pocket vetoes at the final sessions of the Congress as well as those at *ad interim* adjournments of sessions.

The memorandum discloses that there are 120 instances in which the Presidents have pocketed

bills presented during a session of Congress, but less than ten days, Sundays excepted, before an adjournment which did not mark the end of that Congress.

With the exception of the action of the House to which we have referred, occurring in the 69th Congress, we have been unable to find any case where either House of Congress has ever proceeded on the theory that a bill so pocketed had become a law.

No such bill has ever been spread on the statute books, or afterwards recognized as law. In some cases new legislation has been enacted on the subject. In a case like this, practical construction is controlling. (*Myers* v. *United States*, 272 U. S. 52.)

To hold with petitioners in this case would be to resurrect 120 bills, pocketed, as was this one, at various dates since the adoption of the Constitution, and place them on the statute books.

A review of some of the material bearing on practical construction is set forth in the appendix hereto, at page 31.

IV

DECISIONS OF STATE COURTS FURNISH LITTLE AID IN THE DECISION OF THIS CASE

The Massachusetts constitution of 1780 provided (Chapter 1, section I, article II):

> • • • in order to prevent unnecessary delays, if any bill or resolve shall not be returned by the governor within five days after

> it shall have been presented, the same shall have the force of a law.

In *Opinion of the Justices*, 3 Mass. 567, the court said very briefly that a bill sent to the governor less than five days before the end of the legislature would not become a law without his signature, but that if a bill were sent to him before a recess he would have a total of five days before and after that recess in which to pass upon the law. The court does not appear to have had the benefit of argument before reaching its conclusion, and it does not support its conclusion with discussion.

The first amendment to the Massachusetts constitution, adopted in 1821, contained this provision:

> If any bill or resolve shall be objected to, and not approved by the governor; and if the general court shall adjourn within five days after the same shall have been laid before the governor for his approbation, and thereby prevent his returning it with his objections, as provided by the constitution, such bill or resolve shall not become a law, nor have force as such.

In New Hampshire Section VLIV of Part Second of the constitution of 1792, which was in force in 1864, provided:

> • • • If any bill shall not be returned by the governor within five days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislature,

> by their adjournment, prevent its return, in which case it shall not be a law.

The court, in an advisory opinion on *The Soldiers' Voting Bill*, 45 N. H. 607, declared that calendar and not legislative days were meant in this provision.

The same position was taken in *Hequembourg* v. *City of Dunkirk*, 49 Hun (N. Y.) 550.

In *Harpending* v. *Haight*, 39 Cal. 189, the constitution provided:

> Every bill which may have passed the legislature shall, before it becomes a law, be presented to the governor. If he approve it, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated, which shall enter the same upon the journal, and proceed to reconsider it. If, after such reconsideration, it again pass both houses, by yeas and nays, by a majority of two-thirds of the members of each house present, it shall become a law, notwithstanding the governor's objections. If any bill shall not be returned within ten days after it shall have been presented to him, (Sundays excepted), the same shall be a law, in like manner as if he had signed it, unless the legislature, by adjournment, prevent such return.

The court held that the bill must be returned within ten calendar days and that if the legislature were not in session it should be returned to one of the officers of the legislature.

In *Corwin* v. *Comptroller General*, 6 S. C. 390, the constitution provided:

> Every bill or joint resolution which shall have passed the general assembly, except on a question of adjournment, shall, before it becomes a law, be presented to the governor, and, if he approve, he shall sign it, if not, he shall return it, with his objections, to the house in which it shall have originated; which shall enter the objections at large on its journals, and proceed to reconsider it. * * * If a bill or joint resolution shall not be returned by the governor within three days after it shall have been presented to him, Sundays excepted, it shall have the same force and effect as if he had signed it, unless the general assembly, by their adjournment, prevent its return, in which case it shall not have such force and effect unless returned within two days after their next meeting.

The court held that this means an adjournment of both houses; and if only one house has adjourned that is not sufficient. It held that the governor might return a bill to one of the officers of the legislature even though the house of which he was an officer was not in session.

In *Miller* v. *Hurford*, 11 Neb. 377, the State constitution provided:

> Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it; but if not, he shall return it, with his objections, to that house in which

> it shall have originated, who shall enter the objections at large upon the journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of the members present shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the members voting for or against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law, unless the legislature shall, by their adjournment, prevent its return, in which case it shall not be a law.

The court held (pp. 380, 381):

> This act was not signed by the governor, but is certified by the presiding officers of the senate and house of representatives. It is objected that the senate and house adjourned before the expiration of three days from the time the bill was presented to the governor for his approval. It appears from the journals of the two bodies that the adjournment was had from the twenty-ninth of March, 1871, to the thirtieth of May, of that year, and that the governor had possession of the bill for more than three days while the legislature was in session, it being

> retained until June 6, 1871, the legislature being in session from May 30th. The provisions of section 19, article III, of the constitution of 1867 apply to adjournments *sine die* and not to adjournments from time to time.

In *People* v. *Hatch*, 33 Ill. 9, where the State constitution provided:

> • • • If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the general assembly shall, by their adjournment, prevent its return, in which case the said bill shall be returned on the first day of the meeting of the general assembly, after the expiration of said ten days, or be a law,

the court said (pp. 135–138, 166) that full calendar days and not merely legislative days were meant by the provision.

In State v. *South Norwalk*, 77 Conn. 257, where the constitution provided:

> • • • If the bill shall not be returned by the Governor within three days, Sundays excepted, after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the General Assembly, by their adjournment, prevents its return; in which case it shall not be a law,

the court said (pp. 262, 263):

> It follows that the term "three days" as used in the Constitution, when read with due

> reference to the context, can not have been employed to denote in all cases three calendar days. It denotes a period which can not end except upon a day when the house to which this provision refers is or has been in session. * * *
>
> * * * * *
>
> If "three days" means three calendar days, the Governor was often deprived by this new practice of his constitutional right to keep under consideration within that period any bills that might be presented to him on the day of adjournment. If, on the other hand, "three days" means three days during each of which it is possible to return a bill to the house in which it originated, there was no infringement of his prerogatives.

In *State* v. *Joseph*, 175 Ala. 579, the constitution provided:

> * * * If any bill shall not be returned by the governor within six days, Sundays excepted, after it shall have been presented, the same shall become a law in like manner as if he had signed it, unless the Legislature, by its adjournment, prevent the return, in which case it shall not be a law; but when return is prevented by recess, such bill must be returned to the House in which it originated within two days after the reassembling, otherwise it shall become a law * * *.

The court said (p. 585):

> The authorities are unanimous in holding that the adjournment of the Legislature contemplated in the quoted clause of the Consti-

> tution is a final adjournment. It seems necessary, also, to hold that the limit of time during the session—that is, where there has been no final adjournment—within which the Governor shall return a bill in order to prevent it becoming a law without his approval and signature, or, perhaps, it would better express the intent of the provision to say the period of time during which the Governor has the right to consider a bill without its becoming a law independently of him, must be measured by calendar days; for otherwise there would be no reason for excepting Sunday, on which day it is not the practice of legislative bodies in this country to sit for the business of legislation.

In *Johnson City* v. *Eastern Electric Co.*, 133 Tenn. 632, the constitution provided:

> If the Governor shall fail to return any bill, with his objections, within five days (Sundays excepted) after it shall have been presented to him, the same shall become a law without his signature, unless the General Assembly, by its adjournment, prevents its return, in which case it shall not become a law.

The court held that the governor had only five days to consider the bill, even though the legislature might be in recess all that time; that during that time, unless the legislature had finally adjourned, he must return to the legislature or its officers any law of which he disapproved.

These cases, it is submitted, do not show such weight of authority in favor of the proposition that legislative rather than calendar days are meant in the provisions dealing with the return of unapproved bills as to cast doubt upon the long-established practice respecting Federal legislation.

Some of the State courts have held that when a legislature is not in session a bill may be returned to officers of the legislature. (*The Soldiers' Voting Bill*, 45 N. H. 607, 610; *Corwin* v. *Comptroller General*, 6 S. C. 390, 398; *Johnson City* v. *Eastern Electric Co.*, 133 Tenn. 632, 644. See also *Harpending* v. *Haight*, 39 Cal. 189, 200; *Hequembourg* v. *City of Dunkirk*, 49 Hun (N. Y.) 550, 556.)

Other courts have held that a bill may be returned only when the legislature is in session. (*People* v. *Hatch*, 33 Ill. 9, 135; *State* v. *South Norwalk*, 77 Conn. 257, 261; *State* v. *Joseph*, 175 Ala. 579. See also *People* v. *Bowen*, 21 N. Y. 517, 523; 30 Barbour, 24, 30. Compare *United States* v. *Allen*, 36 Fed. 174, 176; *Tuttle* v. *Boston*, 215 Mass. 57.)

In the State decisions there is no preponderance of opinion in favor of the position that a bill may be returned to officers of the legislature when the legislature itself is not in session.

CONCLUSION

The words of the Constitution and the practical construction heretofore placed upon them lead inevitably to the conclusion that the *ad interim* ad-

journment of Congress in this case prevented the return of the bill without Presidential approval, and that the Court of Claims was right in holding that it had not become a law.

Respectfully submitted.

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MARCH, 1929.

APPENDIX

REVIEW OF INSTANCES OF PRACTICAL CONSTRUCTION

A memorandum which was prepared in the Department of Justice and sent by President Coolidge to Congress on December 22, 1928 (70th Congress, 2d session, House Document No. 493) cites 458 bills and resolutions which were passed by Congress and submitted to the President less than ten days before the adjournment of Congress, which were not signed by the President and which therefore failed to become effective, although if Congress had remained in session they would have become effective regardless of the nonaction by the President.

It is true that many of these bills and resolutions call for but slight consideration. In one instance, under President Lincoln, a joint resolution had not been properly authenticated, and it failed for that reason also. In many other instances the bills or resolutions were presented within ten days (Sundays excepted) of the end not only of the session but of the Congress. In other instances bills were not presented to the President until after Congress had adjourned, and some Presidents labored under the impression that they could not sign bills after Congress had adjourned. (Compare 32 Op. A. G. 225.)

But there are also 120 instances in which the President "pocketed" a bill which was presented to him during a session of Congress but less than

ten days (Sundays excepted) before an adjournment which did not mark the end of that Congress. The Presidents have uniformly treated such bills in precisely the same manner as they have treated bills received near the end of the short session; and they have uniformly treated bills originating in the Senate in the same manner as they have treated bills originating in the House of Representatives.

As pointed out in the House Document on Pocket Vetoes, President Madison pocketed a bill relating to naturalization which was passed near the end of the first session of the 12th Congress. Concerning this bill he sent a message to Congress at the beginning of its next session, saying:

To the Senate and House of
Representatives of the United States:

The bill, entitled "An Act supplementary to the acts heretofore passed on the subject of an uniform rule of naturalization," which passed the two Houses at the last session of Congress, having appeared to me liable to abuse by aliens having no real purpose of effectuating a naturalization, and therefore not been signed; and having been presented at an hour too near the end of the session to be returned with objections for reconsideration, the bill failed to become a law. I also recommend that provision be now made in favor of aliens entitled to the contemplated benefit, under such regulations as will prevent advantage being taken of it for improper purposes.

J. MADISON.

NOVEMBER 5, 1812.

It will be observed that the term of Congress had not expired but that the second session was in-

formed why a bill passed at the first session of that Congress had not become a law. The message was not in the form of a veto message. It was sent to both Houses and not merely to the House in which the bill originated, and the bill was not returned for further consideration. The engrossed bill can not now be found.

On the same day as the message was received, the House of Representatives referred it to a select committee. (Annals of 12th Cong., 2d sess., 141.) The committee reported a new bill on November 18 (Ibid. 153); the bill passed the House on February 23 (Ibid. 1110); it reached the Senate on the same day (Ibid. 100); the committee to which it was referred reported it with an amendment on February 26 (Ibid. 109); it passed the Senate in amended form on the evening of March 3 (Ibid. 121) and reached the House too late for it to act on the amended bill (Ibid. 1170). So far as appears in the Annals of Congress, no member of Congress questioned the right of the President to pocket the bill which had passed both Houses in the first session.

In the 14th Congress, first session, a bill "for the free importation of stereotype plates and to encourage the printing and gratuitous distribution of the Scriptures by the Bible societies within the United States" was sent by the House of Representatives to the Senate on April 12, 1816 (Annals of that session, 311), and was passed by the Senate on April 25 (Annals, 352). The Congress adjourned on April 30. (Annals, 372, 1466.) President Madison did not sign the bill nor did he return it to the House of Representatives or to Congress. It is now in the

State Department in a bound volume labeled "Pocketed Laws." So far as appears from the Annals of Congress, the pocketing of this bill was not discussed at the next session.

President Madison clearly understood that he could not return these two bills to Congress when that body was not in session and he did not return them to later sessions of the Congress in which they originated. His interpretation of the provision of the Constitution relating to the enactment of legislation is entitled to great weight. He had had abundant legislative experience in Congress and in the Virginia legislature before the Constitutional Convention of 1787, he had been one of the leaders in the framing of the Constitution and in securing its adoption in the Virginia convention, and he had been a leading member of Congress under the Constitution. He was especially well qualified to decide upon the disposition of bills which were submitted less than ten days before the adjournment of Congress and which were not approved by the President.

Fourteen years passed before another President met this problem. In December, 1830, at the opening of the second session of the 21st Congress, President Jackson's annual message stated his reasons for refusing to sign two bills which he had received at the end of the first session, and with this message he returned one bill to the Senate and one bill to the House of Representatives. The message was not an ordinary veto message, but, considering the return of the bills to the Houses in which they originated, his action was at least equivocal. He had on his hands two unsigned bills which had not become

laws and apparently he did not know how Madison had disposed of bills under such circumstances. But his action at this time should be read in the light of the course taken by him three years later in returning to the Senate at the first session of the 23d Congress a bill which he had pocketed at the end of the preceding Congress and stating his reasons for not approving of the action of the previous Congress. Clearly in that instance the President was not giving the new Congress an opportunity to override a veto.

In December, 1832, at the opening of the second session of the 22d Congress, President Jackson returned to the Senate, in which it had originated, a bill which had been passed at the end of the first session "with the reasons which induced me to withhold my approbation, in consequence of which it has failed to become a law"; and on the same day he returned to the House of Representatives, in which it had originated, a bill which had passed at the end of the first session, saying, "I have been compelled to withhold from it my signature; and it has therefore failed to become a law." Neither House of Congress took any further vote on either of these two bills.

In December, 1833, President Jackson returned to the Senate at the first session of the 23d Congress a bill which had been sent to him at the end of the second session of the 22d Congress, and with it he submitted to the Senate reasons why the bill should not become a law. The bill had finally passed on March 1 and Congress had adjourned on the legislative day of March 2. Although the bill was returned to the Senate, together with reasons

why it should not become a law the message can not be considered as vetoing a bill passed by a previous Congress, and the Senate took no steps towards passing the bill over the veto. Five days later Senator Clay introduced a similar bill. (Cong. Debates, vol. 10, pt. 1, col. 23; Cong. Goble, vol. 1, p. 18.)

The message of the President was discussed at some length. (Cong. Debates, vol. 10, pt. 1, cols. 15–18.) A few extracts from the discussion are interesting:

"Mr. Benton then moved to take up the message for consideration."

"Mr. Moore said he thought that the Senator from Missouri would have another opportunity of offering what he wished to say; and he was himself desirous to move the printing of an extra number of the Message."

"Mr. Benton said that a shameful and unfounded attack had been made on the President, and he wished to repel it."

"Mr. Poindexter said he should have no objection to vote for the motion, if he knew what was to be considered. If the gentleman would show that there could be any action on the subject, he would agree. This was one of the acts of the Executive which was out of order. He had sent to the Senate his constitutional objections to a bill which had become defunct by the expiration of the last Congress. It was a document intended not for the Senate, but through that body to give to the people the reasons by which he had been influenced. There could be no action on the subject by the Senate. The Constitution prescribes that, when a bill was

returned by the President, the ayes and noes should be taken, and if two-thirds of both Houses should vote for its passage, it should become a law, the President's objections to the contrary notwithstanding. But it was necessary that the bill should be returned to the Congress by which it was passed. There could now be no action on the subject; and the President had sent his reasons here without intending that there should be any reply to them. The paper, therefore, was sent out of time, like many other papers which had been sent to the Senate from the same quarters, since he (Mr. P.) had been there; and it was not competent to the Senate to take any course respecting it. It was a message to the people, through the Senate; and that he presumed was the impression of the gentleman from Alabama, when he expressed a wish for the printing of an extraordinary number. If the bill had become a law, no action of the Senate could annul it; if not, they could do nothing to make it so. He was against considering it now, or at any time."

Senator Poindexter was unquestionably in the right when he said that the bill had become defunct by the expiration of the previous Congress. As the Senate afterwards ordered the printing of five thousand extra copies of the message, it is possible that it felt that the message was not intended solely for legislative consideration.

Senator Clay attacked the action of the President, taking the extreme position that the President could not pocket a bill at the end of the short session. He said:

"And he must repeat, that the withholding of the land bill, at the last session, under all the circum-

stances of the case, was a violation of the Constitution, and disrespectful to the Senate." * *

"It may be true that there was a great press of business on the President on the 2d of March, and that he may have acted upon some ninety or one hundred bills. But this is what occurs with every President on the day before the termination of the short session of Congress. With most of those bills the President must have been less acquainted than he was with the land bill. Of some of them he probably had never heard at all. Not one of them possessed the importance of the land bill. How did it happen that the President could find time to decide on so many new bills, and yet had not time to examine and dispose of one which had long been before him and the public; one embracing a subject which he thought the union, harmony, and interest of the States required should be speedily adjusted; one which he himself had pronounced his judgment upon at the commencement of this session? By withholding the bill, the President took upon himself a responsibility beyond the exercise of the veto. He deprived Congress altogether of its constitutional right to act upon the bill, and to pass it, his negative notwithstanding.

"The President is, by the Constitution, secured time to consider bills which shall have passed both branches of Congress. But so is Congress equally secured the right to act upon bills which they have passed, and which the President may have thought proper to reject. If he exercises his veto, and returns the bill, two-thirds may pass it. But if he withholds the bill, it can not become a law, even although the two Houses should be unanimously in its favor.

"Mr. C. denied that the Constitution gave to the President ten days to consider bills, except at the long session. At that session, the period of its termination is uncertain, and dependent upon the will of Congress. To guard against a sudden adjournment, by which the President might be deprived of due time to deliberate on an important bill, the Constitution provides for ten days at that session. But, at the short session, it is not an adjournment, but a dissolution of Congress, on the 3d of March; and the day of that dissolution is fixed in the Constitution itself, and known to all.

"Mr. C. contended, therefore, that the act of withholding the bill was arbitrary and unconstitutional; by which Congress, and the Senate especially, in which the bill originated, were deprived of their constitutional right of passing on the bill, after the President had exercised his powers. Respect to Congress required of the President, if he really had not time to form a judgment on the bill, or, having formed it, had not time to lay his reasons before the body, a communication to that effect. But, without condescending to transmit one word upon the subject to Congress, he suffered the session to terminate, and the members to go home destitute of all information, until this day, of his intentions.

"Mr. Benton said that no quorum sat, in either House, on the evening after the day on which the bill was sent to the President.

"The message was then laid on the table, when

"Mr. Moore moved that 5,000 extra copies of the message be printed for the use of the Senate; which motion was adopted."

Senator Clay certainly did not take the position that the President is without power to pocket a bill which comes to him at the end of the long session of Congress.

In December, 1834, at the commencement of the second session of the 23d Congress, President Jackson sent to Congress a message in which he said that he had withheld his approval from a bill to improve the navigation of the Wabash River, which had passed both Houses at the first session, and he returned the bill to the Senate, in which it had originated. The unsigned bill is now in the custody of the Secretary of the Senate. Written in ink upon the bill itself where the President would sign if he approved are the words "Not Approved." The power of the President to pocket this bill was not challenged, but a new bill was introduced and passed the Senate even though it did not receive the two-thirds vote which would have been necessary to override a veto. (Cong. Globe, vol. 2, pp. 40, 102.) The House did not act upon the bill.

In August, 1842, at the end of the second (not the last) session of the 27th Congress, President Tyler pocketed two bills which originated in the House of Representatives. In December, 1842, at the beginning of the third session of that Congress, he sent to the House of Representatives a message concerning those two bills. The message is, with other presidential messages to the House of Representatives, now in the custody of the manuscript division of the Library of Congress; but neither bill is with the message, nor does the message suggest that either bill was ever returned to the House in which it originated. The President's

right to pocket these bills was unchallenged. In the case of the one relating to preemption rights of settlers on public lands, a new bill was introduced. (Cong. Globe, vol. 12, pp. 54, 233, 320, 368, 370, 396.) In the case of the bill relating to the taking of the testimony in cases of contested elections, the President had said:

"As the Bill has failed under the provisions of the Constitution to become a Law, I abstain from expressing any opinions upon its several provisions. * * *"

A new bill was introduced January 5, 1843. (Cong. Globe, vol. 12, p. 121.) On February 24, it was considered in the House. Ibid., p. 344.)

"Mr. Halsted moved to amend the bill so as to make it precisely like the bill passed at the last session, and the amendment was agreed to.

"The bill was then ordered to be engrossed under the operation of the previous question, and it was read a third time; and the question recurred on its passage, on which Mr. Fillmore moved the previous question.

"Mr. Weller called for the yeas and nays on the passage of the bill, which he said had been hurried through in such profound silence, that they scarcely knew what it was. [Loud cries of 'Oh, it's the bill which Captain Tyler pocketed at the close of the last session'; and countercries of 'Well, as there are not ten days of the session remaining, he may pocket it again.']

"The yeas and nays being taken, resulted—yeas 105, nays 82."

The bill was reported to the Senate without amendment on February 28 (Ibid. 363) but it does not appear to have reached a vote in the Senate.

On the last day of the first session of the 35th Congress President Buchanan pocketed a joint resolution in regard to the carrying of the mails. In the following January, in the next session, he sent a message to the House of Representatives setting forth his reasons for doing so. The message is printed in the journal of the House; but it is not printed in the Congressional Globe, nor does it appear to have been discussed in Congress. It will be noted that the message was not sent to the House within ten days from the reassembling of Congress.

On the last day of the second session of the 35th Congress President Buchanan pocketed a bill making an appropriation for deepening the channel over the Saint Clair flats. In the first session of the 36th Congress, in February, he sent to the Senate a message setting forth his reasons for doing so. It is printed in the Senate Journal and in the Congressional Globe for February 2, 1860. It does not appear to have been discussed in Congress. It contains the following paragraph which, in view of the broad language used, is material to the case now before the Court, even though it relates to a bill passed by a previous Congress:

"It is scarcely necessary to observe that during the closing hours of a Session it is impossible for the President on the instant to examine into the merits or demerits of an important Bill, involving as this does grave questions both of expediency and of Constitutional power, with that care and deliberation demanded by his public duty as well as by the best interests of the country. For this reason the Constitution has in all cases allowed him ten days for deliberation; because, if a Bill be presented to

him within the last ten days of the Session, he is not required to return it, either with an approval or a veto; but may retain it, 'in which case it shall not be a law.' Whilst an occasion can rarely occur when so long a period as ten days would be required to enable the President to decide whether he should approve or veto a Bill; yet, to deny him even two days on important questions before the adjournment of each session for this purpose, as recommended by a former annual message, would not only be unjust to him, but a violation of the spirit of the Constitution. To require him to approve a Bill when it is impossible he could examine into its merits, would be to deprive him of the exercise of his Constitutional discretion and convert him into a mere register of the decrees of Congress. I therefore deem it a sufficient reason for having retained the Bill in question that it was not presented to me until the last day of the session. * * *"

In January, 1865, President Lincoln sent to the House of Representatives a message saying that he had not signed a joint resolution of the previous session. His power to pocket this resolution does not appear to have been challenged.

A bill to regulate the elective franchise in the District of Columbia passed the Senate on December 13, 1866 (Cong. Globe, 39th Cong., 2d sess., pt. 1, p. 109), and the House on December 14 (p. 138). On December 20 both Houses adjourned to Thursday, January 3, 1867 (pp. 224, 237). The bill was not presented to the President for approval until December 26, twelve days after it had passed both Houses, six days after Congress adjourned, and less than ten days, Sundays excepted, before Congress reconvened.

On January 7 a message from President Johnson reciting these dates and vetoing the bill was placed before the Senate, the House in which the bill originated (p. 303). The bill was passed over the veto by the Senate on January 7 and by the House on January 8. As the time allowed to the President for consideration of a bill is counted from the time it is presented to him and not from the time it passed Congress, it seems probable that the representatives of Congress delayed the presentation of this bill to the President for twelve days so that he would not have ten days (Sundays excepted) before the reassembling of Congress in which he might pocket the bill.

On March 30, 1867, both Houses of Congress "adjourned" to the first Wednesday in June. (Cong. Globe, 40th Cong., 1st sess., 438, 441, 454, 458, 463.) A bill was presented to President Johnson two days after adjournment. He refused to sign it upon the ground that he could not do so after Congress had adjourned. On July 8 the Speaker ruled that the House of Representatives had not adjourned but had taken a recess. (Globe, p. 512.) The House adopted a resolution that the bill be reenrolled, signed by the two Houses of Congress and presented to the President (pp. 510, 512). In the Senate the resolution was declared out of order under a Senate rule that no general legislation should be taken up during the session (pp. 606, 609). Senator Trumbull made the following remarks which appear to answer the position taken by the Speaker of the House (p. 608):

"Now, it is a law if we have been in session all the time, because it was presented to the President and he did not return it. If we were not in session,

and by our adjournment prevented its return, then it is not a law. These are the words of the Constitution. Now, sir, it can not be supposed that the President could have held all the bills of the last session for three months. During the intermediate time, from March to July, we were in session or we were not in session. Which were we? If we were in session, it is a law—he did not return it; if we were not in session, it is not a law. * * *

"If a bill was presented to him and he thought proper to sign it, that made it a law, whether there was an adjournment or a recess. You can not adjourn for more than three days at a time except by a concurrent resolution, and then it amounts to an adjournment of Congress."

On July 20, 1867, Congress adjourned until November 21. On that day the President received and pocketed a bill for the securing of equal rights in the District of Columbia. On November 21 (Cong. Globe, 40th Cong., 1st sess., p. 767):

"Mr. Sumner asked, and by unanimous consent obtained, leave to introduce a bill (S. No. 141) for the further security of equal rights in the District of Columbia; which was read twice by its title."

"Mr. SUMNER. This is an exact copy of a bill which passed Congress immediately before its adjournment, and which was signed by the President of the Senate and the Speaker of the House of Representatives, and duly sent to the President, but which was never returned by him. I presume that the bill has fallen; that owing to the adjournment of Congress there were no eleven days of session within which the bill could be returned, and that the bill is now, therefore, in the hands of the President, and it is beyond our reach. Under

these circumstances I introduce the bill again *verbatim* as it passed both Houses; and, if there be no objection, I would submit that the Senate proceed with it now. It has already had, I believe, nearly the unanimous vote of this body on a former occasion—certainly the vote of a very large majority, and it has been enrolled. I suggest, therefore, that the Senate proceed with it to-day, and send it to the other House, and make another endeavor to bring it to a close."

The Senator did not, however, secure unanimous consent for the immediate consideration of the bill and it was not passed at that session.

President Johnson later again pocketed a bill for the same purpose and he pocketed several other bills which had not been presented to him ten days before the adjournment of Congress. The one "for the further security of equal rights in the District of Columbia" was presented to the President on December 11, 1867. On December 20, the two Houses adjourned to January 6, 1868. The Senate having requested the President to inform it as to the disposition of the bill, he sent a message in which, after referring to the dates above set forth, he said:

"Congress, by their adjournment, thus prevented the return of the bill within the time prescribed by the Constitution, and it was therefore left in the precise condition in which that instrument positively declares a bill 'shall not be a law.'"

After some discussion in the Senate on January 24, 1868 (Cong. Globe, 40th Cong., 2d sess., pt. 1, pp. 720, 721), the message was referred to the Judiciary Committee. Senator Edmunds, who moved this reference, cited the *Opinion of the Justices*, 45 N.

H. 607, in opposition to the position taken by the President, and Senator Buckalew supported the President's position by reference to executive and congressional precedents. Senator Sumner said (Cong. Globe, as above, p. 721):

"I merely wish to suggest that the term 'adjournment,' which is the subject of comment now, in the place where it occurs in the Constitution, should be interpreted to be an adjournment *sine die;* that is, such an adjournment as brings an existing session of Congress to a complete close. If we give to it that interpretation then of course the action of the President is inappropriate. But I do not wish certainly to dogmatize on a question of that kind * * *."

On February 17, 1868, Senator Edmunds reported from the Judiciary Committee "a bill regulating the presentation of bills to the President and the return of the same." (Globe, pt. 2, p. 1204.) As described in the Globe (p. 1371):

"It provides that the ten days mentioned in section seven of article one of the Constitution, within which the President of the United States is required to return to the House in which it originated any bill not approved by him, shall be held and construed to be ten calendar days (Sundays excepted) next after the day of the presentation of any such bill to him; and the adjournment of Congress, which shall prevent the return of any such bill by the President to that House in which it originated, is to be held and construed to be the final adjournment of a session, and not an adjournment of either or both Houses of Congress, acting by themselves or with the consent of each other, as provided for in the Constitution, to a particular day. And if at

any time within those ten days the President shall desire to return a bill to the House in which it originated, or to send a message to such House that he has signed the same, when such House is not sitting, it is to be lawful for him to return such bill or send such message to the office of the Secretary of the Senate or Clerk of the House of Representatives, as the case may be, and the Secretary or Clerk is to endorse thereon the day on which the return shall be made or the message received, and make entry of the fact of such return or the receipt of such message in his Journal of the proceedings; and such return or sending of such message is to be deemed and taken to be a return of the bill to the House in which it originated, or a sending of the message to that House, to all intents and purposes. Every bill which, having passed both Houses of Congress and having been presented to the President as provided in the Constitution, shall not have been returned by the President with his objections thereto to that House in which it originated within the time herein defined and declared is to be a law. * * *"

Senator Davis said (pp. 1372, 1373, 1405):

"Here is an objection that occurs to me at present to this bill: the Constitution requires that if the President does not approve a bill he shall return it with his objections to the House in which it originated; this bill provides a different mode of disposing of that bill in case Congress has temporarily taken a recess or an adjournment. It dispenses with the requisition of the Constitution that the bill shall be returned to the House, and directs that it be returned to the officer of the House, if the

body is not then in session. I do not believe it is competent for Congress to make any such change as that. I believe that the Constitution is mandatory in that respect; that the bill, where the President vetoes a bill, must be returned to the House, and not to the officers of the House. Of course, if he is to return the bill to the House, the House must be in session, because it is not a House unless in session in the sense in which the Constitution requires the bill to be returned to the House by the President with his objections. * * *

"I think it is the duty of the President, in the plain language of the Constitution, to return the bill, not to the Secretary or Clerk of either House, but to the House itself. That is the unambiguous and plain language of the Constitution. Then the question is, what is returning the bill to the House? It is returning it to the Senate or the House of Representatives in session, because when it is returned it is to be at once considered again. The Constitution contemplates that simultaneously with the return of the bill to the House in which it originated the House may take up the matter for consideration. But, sir, I think there can not be any doubt whatever as to the effect of the language. The language is, that the bill shall be returned to the House in which it originated. I take the position that to return the bill to the Clerk of the House of Representatives, if it originated there, or to the Secretary of the Senate, if it originated in the Senate, when those bodies are not in session, is not a return of the bill to the House in which it originated. * * *

"Suppose the Constitution or the law requires the President to communicate to the two Houses or

either of the Houses in the performance of that duty, when both Houses or the particular House to which he is directed to make communication be not in session, is he authorized to communicate to the Secretary or to the Clerk of that House? I conceive not. It is the duty and the right of the President to communicate to the House and not to a ministerial officer of the House. To enable him to communicate to the House it must necessarily be in session, because he can not communicate with either House when it is in any other situation than in actual session. It must be assembled and in actual session. * * *"

Senator Bayard said (p. 1941):

"The construction given by the committee is, in my judgment, erroneous in two respects. In the first place, the committee confine the term 'adjournment,' as used in the Constitution, to a particular meaning not justified by its received signification at the time of the passage of the Constitution and now, or by its etymology. An adjournment may be defined to be, I will not say a suspension of business, but a postponement of session for a period of one day, from one day to another, or for any number of days. That is an adjournment. It may be from day to day; it may be without day; it may be for a period of ten days or three months. Each is equally included under the word 'adjournment.' The committee, however, proposed to confine the meaning of the word 'adjournment,' as used in this clause of the Constitution to adjournment without day. The Constitution uses no such language. It is necessary to add to the general term 'adjournment' there used the words 'without day,' or '*sine die*,' in order to justify the construction for which the committee contend.

"But, Mr. President, there is an additional objection which to my mind is all powerful. The committee propose in the same section, not intending to deprive the Executive of the ten days to which he is entitled, that if Congress is not in session during the ten days or at the end of the ten days the President may send the bill to the office of the Secretary of the Senate or the Clerk of the House of Representatives, according to the House in which the bill may have originated. There is no such provision in the Constitution; and the settled usage of this Government, without a single exception from its foundation, is that no communication is made by the Executive to either House except to the House in session, and that usage ought to have a controlling influence to exclude the idea which is contained in the provision of the bill that I am now referring to. * * *

"If you are in session on the last day of the time, it is immaterial that you may have adjourned in the interim, because that does not prevent the return of the bill. He is to return it within the time, not on any particular day. You can not abridge the time by a construction of the Constitution. You are not bound to be in session in the interim. If on the day on which the limitation expires the House in which the bill originated is in session, beyond all question a return then would be within the terms of the Constitution and would give to the President the full time to which he is entitled. There is no obligation on him and no reason why he should return the bill on any particular day within the ten days; but he is entitled to the whole time; and if Congress, by its adjournment, does not deprive him of any portion of that time, of course in that case Congress by its adjournment has not prevented the return of the bill with his objections.

"I hold, therefore, that the true construction of the Constitution is plain. The intent of the Constitution is immediate procedure. I do not say that the House may not, when the message comes before them, postpone its consideration to a subsequent day but they have the right to act at once. The intent of the Constitution is that they may, if they see fit, reconsider that measure with the President's objections after the period of ten days has expired. But under the construction this bill gives a bill might be returned when Congress had adjourned for three weeks to the office of the Secretary of the Senate, or even after Congress had adjourned for the session. It is true the bill says the word 'adjournment' is to be construed to mean adjournment for the session. What is there to justify this attempt to add words to the language of the Constitution so as to give to the term 'adjournment' a meaning other than what its etymology and its ordinarily received signification implies? I am unable to understand the reasoning of the committee on that point."

Senator Bayard then discussed the New Hampshire opinion at some length. Two passages from that discussion are especially worth noting (p. 1942):

"There is but one argument used by them which I shall notice. I may say, before referring to it, that one great objection to the weight of the decision would naturally be with every man that it was an unargued case. * * *

"The court, in the course of their argument, rely very much on the usage in that State applied to another matter. The usage in New Hampshire is to send the bill to what is called the executive

chamber. In that case it was sent to the executive chamber, but the Governor did not get it till the day after it was sent there. The court held, under the usage, that the bill had been delivered to him within the intent of their constitution on the day on which it was sent there. Here the usage of the Government of the United States, from its origin to the present day, is, that in no single case has a President of the United States, on the return of a bill to the Senate or House of Representatives, ever undertaken to file his message with the Clerk of the one or the Secretary of the other; but the action of the Executive has uniformly been by message sent to the House when in session. That is the settled usage; and when you look to the language of the Constitution, that the bill is to be returned to the House, it is certainly forcing language to say that a return to the House means filing a paper with the Secretary or Clerk when the House is not in session."

Senator Buckalew said (pt. 3, p. 2076):

"I should like to know how the Secretary can make entries and make up a Journal when the Senate is not in session. I can understand that when the Senate reconvenes the Clerk may hand to the President of the Senate, just as any member might or any outsider might, the particular paper, and it may then be presented to the Senate, and it may be entered in the Journal. But this bill contemplates that our Secretary shall make and keep a Journal when the Senate is not here at all, when there can be no Journal of its proceedings.

"* * * How can you by law charge upon the President, under the Constitution of the United States, the duty of communicating with the Sec-

retary of the Senate or communicating with anyone else except the Senate itself?"

Senator Edmunds, supporting the bill, said (p. 2076):

"The fault in the argument against this bill is in considering that the adjournment of one House to a definite time, either with or without the consent of the other House, as the Constitution may permit or provide, is an adjournment of Congress, the law making and legislative power of the country, a consolidated body in legal contemplation when the concurrent act of the two Houses is requisite to the perfection of a measure. If that be the nature of each House it is still a House and a body, although it does not sit every moment of time, and it has an officer who, for all purposes with which the law may clothe him, represents that body in a mere executive and ministerial point of view. * * *"

"What, then, do we provide? We simply provide that he may communicate with this body while its active operations are in a state of suspense from one day to another, or from one day to two or three days or a week, as the case may be, by filing the paper that the Constitution gives him a right to file within that time with the responsible officer whom the law designates to receive it; and then all that is required of that officer is that he shall enter upon his Journal, which is a book that the rules of the Senate and the Constitution require to be kept—not any daily entry of proceedings, not an ideal thing, but an actual book, the book of record—that he shall enter in that book of record, under the date upon which the bill is returned, the fact that it is returned with the message. Then, when

we meet on the next day, whenever that day may be, when the Journal of the last day's proceedings is read, you find the official entry, the record of the clerk that the law requires him to make, that on such a day this bill, with the accompanying message, was returned. Is there anything irregular or illegal in that when the law has once fixed it? I certainly fail to perceive it."

Senator Buckalew replied (p. 2076):

"Mr. President, the Constitution provides that the Senate shall keep a Journal of its proceedings, of what it does itself. In another clause it is provided that when the President returns a bill with his objections that message thus containing his objections shall be entered upon the Journal of the Senate. The fact of receiving such a message and the entry of that message upon the Journal must, in the very nature of the case, be when the Senate itself is in session."

Senator Hendricks, supporting the bill, said (p. 2077):

"It has come to be the habit of Congress, and of each branch of Congress, to take recesses. Those are clearly not adjournments within the meaning of the Constitution, as I think. Then a case of that sort must be provided for, and I think it is proper that by law we should settle that which is not settled perhaps definitely by the Constitution. Now, I think it is proper for Congress to say explicitly that a recess is not an adjournment; that a recess for a term of days by the two branches is not an adjournment; and especially a recess of either branch for a period less than three days is not an adjournment, and to provide what shall be done with a bill that is returned from the President dur-

ing that time. It is simply a declaration on the part of Congress that it is still in session, and a provision whereby a bill may be returned. In that view, I support the measure."

Senator Morton, opposing the bill, was the last speaker (p. 2078):

"It would be just as good for the private Secretary of the President to retain a bill as for the Secretary of the Senate; just as much a compliance with the provision of the Constitution; and it would be just as satisfactory to my mind for the President to retain it during the odd days as for the Secretary of the Senate to do so.

"It seems to me, Mr. President, that the bill is not founded upon the correct principle in that respect. I agree that it is the final adjournment of Congress, of both Houses, that was intended to defeat a bill. That is the spirit and meaning of the Constitution; and if we start out with that as a key, we shall find that it makes no difference whether the bill be returned on the eleventh or twelfth day, if that be the first day that the Senate or House shall be in session after the ten; but to say that it may be returned to a subordinate officer, to the Secretary or to the President of the Senate, or to the Speaker of the House, and that that shall be a compliance with the Constitution, it does seem to me, in the language of the Senator from Pennsylvania, is absurd.

The bill passed the Senate on March 24, 1868. It was received by the House of Representatives on the same date (Cong. Globe, 40th Cong., 2d sess., p. 2083); was brought up in the House on July 22, and was then referred to the House Committee on

the Judiciary (Globe, pt. 5, pp. 4341, 4342). On July 27 both Houses took a recess until September 21. (Globe, pp. 4501, 4518.) No further action on the bill was taken.

Apparently Senator Edmunds did not hold the same views in 1884 as he expressed in 1868. In an opinion rendered by Attorney General Miller in 1892 is this passage (20 Op. A. G. at 506):

"Hon. George F. Edmunds, President *pro tempore* of the Senate, in a note to President Arthur under date of December 24, 1884, expressing a like opinion says:

"'A bill * * * has passed both Houses of Congress and was presented for my signature after both Houses have adjourned until 5th of January. This is more than ten days, and, if it were now presented to you, you could not return it with your objections. I do not know what the practice has been, but it would seem to me as if the bill could not become a law constitutionally; but if you think it can I will send it to you.'"

The Attorney General added that Senator Edmund's note was probably not carefully considered but that it stated his impression at the time.

No further messages were sent by any of the Presidents to either House of Congress concerning pocketed bills. Bills, however, were pocketed. Many such bills are cited in House Document No. 493. One of these was pocketed by President Harrison in December, 1892, after receiving an opinion from Attorney General Miller (20 Op. A. G. 503) in which he quoted from a memorandum communicated by Attorney General Devens to President Hayes saying:

"All these provisions indicate that in order to enable the President to return a bill the Houses should be in session; and if by their own act they see fit to adjourn and deprive him of the opportunity to return the bill, with his objections, and are not present themselves to receive and record these objections and to act thereon, the bill can not become a law unless ten days shall have expired during which the President will have had the opportunity thus to return it. There is no suggestion that he may return it to the Speaker, or Clerk, or any officer of the House; but the return must be made to the House as an organized body."

Attorney General Miller added (20 Op. A. G. at 507):

"Suppose Congress having met on the 1st of December were, on the 1st of February, to adjourn until the 1st of October. What would become of a bill presented to the President and not approved within ten days? It could hardly remain in a state of suspended animation until Congress should reconvene. The President could not veto it in the manner provided by the Constitution; and, this being so, it would appear to follow that if not signed it must fail to become a law."

There does not appear to have been any further discussion in Congress concerning such pocketings until President Cleveland during the Christmas recess of 1896 pocketed two private pension bills. Both bills were reintroduced. S. 3622 was passed and became a law without the President's approval. (Cong. Rec., vol. 29, pt. 3, p. 2024.) S. 3623 was amended to provide a smaller pension and was approved by the President. (Pp. 2023, 2525.) The following extract shows the discussion in the Senate on February 1, 1897 (Cong. Rec., vol. 29, pt. 2, p. 1378):

"Mr. HILL. A bill of which this is an exact copy passed the House of Representatives a long time ago, and it passed the Senate in December last. It was one of the bills which was presented to the President just previous to the holiday recess, which was a recess for a longer period than ten days. The President did not act upon the bill, but it was sent to the office of the Secretary of State as a dead bill, it being claimed that Congress had by its adjournment prevented action, and that therefore the bill had expired. I am inclined to doubt whether a mere recess, such as was then taken, was an adjournment within the meaning of the Constitution which would render the bill a dead bill. The question has never been tested in the courts, as I am advised, and this widow has not the money with which to test it. It is easier, as I think, to have the bill passed over again and sent to the President. I therefore ask that the bill may now have present consideration.

"The VICE PRESIDENT. Is there objection to the request of the Senator from New York?

"Mr. GALLINGER. I think the request of the Senator from New York is a very proper one. The bill reached the President two days before the late recess, and it was held by the President that ten days having elapsed during such recess, it has the same bearing upon a bill as though it were passed upon the final adjournment of a Congress. I agree with the Senator from New York that that is a matter of very great doubt. I think I should take issue with the Executive; but it could only be tested in the courts, and the easiest way is to pass the bill again."

These remarks, which do not appear to have been based upon any careful examination of the subject,

appear to have constituted the last discussion of pocket vetoes in Congress until the Judiciary Committee of the House of Representatives of the 69th Congress, second session, made a report to that House adopting the report of a subcommittee which said (Cong. Rec., vol. 68, pt. 5, p. 4933):

"While this is a question not free from difficulty, it is the opinion of your subcommittee the clear intent of the Constitution is that Congress shall have the opportunity to consider the President's objections, if any; that the adjournment contemplated in the constitutional provision relating to presidential objections to bills and return thereof is the final adjournment of Congress, not an interim adjournment. Therefore your subcommittee is of the belief that the adjournment on July 3, 1926, of the first session of the Sixty-ninth Congress, did not suspend the President's duty with reference to bills presented to him on that day, wherefore H. R. 5218 became a law by the lapse of the constitutional 10 days."

The committee said that an adjournment other than one which terminates the existence of a Congress does not render the return of a bill impossible and suggests that the President might have returned the bill to officers of Congress.

No President has ever acted on the view that he had ten legislative rather than ten consecutive calendar days on which to consider a measure. The Senate Committee did not take that position in 1868. The House Judiciary Committee did not clearly so declare in 1927. Congressional precedents can not be urged in support of such a position.

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